IN THE

Supreme Court of the United States

October Term, 1977

Docket No. 77-1094

CARMINE GALANTE,

Petitioner

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, WASHINGTON, D.C., WARDEN OF THE METROPOLITAN CORRECTIONAL CENTER, NEW YORK CITY, ET AL.,

Respondents

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF HABEAS CORPUS

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Motion for Permission for Leave to File Petition for Habeas Corpus

SIRS:

PLEASE TAKE NOTICE, that upon the annexed petition of Carmine Galante, the undersigned prays that this court grant said motion of leave to file said petition attached heretofore, and order the said respondents to show cause why leave to file the petition for a writ of Habeas Corpus should not be granted.

This proceeding is invoked under this court's jurisdiction to issue "extraordinary writs" under Rule 30, 31, of the Rules of the Supreme Court. Petitioner seeks issuance of an original writ of Habeas Corpus directly before this Court pursuant to 28 U.S.C. Sections 2242, 2241.

This petition raises serious constitutional issues and for proper redress this is our proper vehicle.

Petitioner Galante, has no understanding of law nor is he familiar with these procedures. This application has been perfected with the legal assistance of Jerome Rosenberg, an inmate lawyer who is acting for and on behalf of petitioner as next of friend and counsel. Your writer, while in prison has obtained a Bachelor, and Doctorate Degree in Law, and has been permitted to represent inmates and "persons not imprisoned" at jury trials, hearings, and on appeals, both in our Federal and State Courts.

Presently, petitioner Galante is being confined and detained under an alleged Parole Violation.

This application is presented in good faith on crucial grounds. In the event this Court deems it necessary to refuse leave to file, we request this court to grant an order directing the transfer of this writ under 2241 (B) with instructions that it be heard before another judge, other than Judge McMahon, the trial judge, on the grounds of prejudice, and further we intend to call Judge McMahon as a witness at an evidentiary hearing if said hearing is granted.

WHEREFORE, it is prayed that this Court grant said relief requested.

DATED: New York, New York
February , 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

CARMINE GALANTE,
Petitioner, Relator,

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, WASHINGTON, D.C., WARDEN OF THE METROPOLITAN CORRECTIONAL CENTER, NEW YORK CITY, ET AL.,
Respondents.

Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241, 2242

To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court

The Petition of Relator Carmine Galante respectfully shows:

1. Relator moves this Court for an original writ of Habeas Corpus pursuant to 28 U.S.C. Section 2242, by reason of the fact that he is unlawfully detained and restrained of his liberty by the above-named respondents.

2. Petitioner is presently in Federal custody and is a Citizen of the United States and is over twenty-one years of age. The cause or pretext of said detention and restraint is a judgment of Conviction of the United States District Court for the Southern District of New York dated: June 25, 1962, whereby relator was found guilty before a jury trial, for Conspiracy to Violate the Narcotic

Laws pursuant to 21 U.S.C. Sections 173, 174, (Judge McMahon) presiding. On July 10, 1962, Relator was sentenced to a term of twenty (20) years imprisonment and received a $20,000 fine.

3. The United States Court of Appeals affirmed said conviction with opinion. *United States v. Bentvena,* 319 F.2d 916 (2d Cir. 1963). A petition for rehearing was denied on the 16th day of July 1963. *Certiorari* was denied, 375 U.S. 940, 84 S.Ct. 345, 11 L.ED. 2d 271 (1963). A petition for rehearing was denied on April 20, 1964. Subsequently a motion was made to the original trial court for reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure. Said application was denied on February 5, 1964. All appellate remedies available to relator have been exhausted.

4. Relator is not being detained by any final mandate or process issued by any court within the jurisdiction of the United States.

5. Relator is being detained and restrained of his liberty by the improper tactics committed by the trial court, which violated his constitutional rights to his Sixth Amendment right to effective assistance of counsel, and Due Process of Law to receive a fair trial.

Introduction

In this case of petitioner, with sentence of twenty years, fairness and justice require that close judicial scrutiny be devoted to ascertain whether the scales in the case of petitioner Carmine Galante, were unlawfully tipped against him by any misconduct of the prosecutor or the trial judge. We submit that precisely such a prejudicial tipping of the scales occurred in connection with the Court's misconduct of depriving Galante of effective

assistance of counsel during trial, and further causing him a total deprivation of counsel.

The following recital of facts aims at presenting everything of substantial relevance to the case and issues of petitioner Galante, with a view of letting the sufficiency of the Government and Court's arbitrary conduct speak for itself.

For this Honorable Court's convenience, and to avoid repetition, we will develop our factual substance which is primarily the basic foundation of our issues to be consolidated with our argument at appropriate places *infra,* for clarity relating to our respective points herein.

Where it is deemed necessary, we will refer to the court of appeals opinion and, numbers in parentheses will refer to the trial transcript.

It is our respectful submission in this case that the occasion is presented for this court to inquire under its powers of judicial supremacy in the interest of preserving the principles of constitutional liberty and of authentic judicial fairness, whether the phenomenon, vernacularly known among the Bench and Federal Bar in New York as "A Judge McMahon Trial," is intrinsically offensive to due process and to proper judicial administration, because in and of itself, the very circumstances that a trial judge, commits acts which are demonstrably designed in their entirety to hamper and prevent a defendant from receiving a fair trial in a criminal case, cannot be countenanced.

Occasionally in the legal or judicial history of a nation or a society, the name of a judge becomes associated with some distinctive feature of the judicial process of an era.

In our time, in the Southern District of New York, we have the distinctive phenomenon known among the Bar as

"Hanging judge McMahon." A judge who in certain cases of Government concern, has allied himself with the cause of the prosecution and who in his heart and mind will do everything possible to aid the government in obtaining a conviction.

We shall develop the detailed circumstances which we believe justify our above introductory remarks concerning the improper conduct. Our argument in this respect will show how the court did under "Prepense" subject petitioner to serious deprivations on the crucial issues of his Sixth Amendment right to counsel in many factors.

Issues Presented

1. Did the Court of Appeals err as a matter of law based on the District Court's ruling that Petitioner Galante was not deprived of effective assistance of counsel on the assumption and unfounded conclusion of "Manipulation"?

2. Was Petitioner Galante deprived of his Constitutional Right to counsel of his own choice?

3. Was Petitioner Galante violated of his Sixth Amendment rights, where the trial court forced unwilling counsel upon him, and where counsel did not participate in three days of trial? In point thereof, was Galante deprived of his rights, where this constituted a total deprivation of counsel, and in effect without consent forced petitioner in the capacity of a pro se defendant?

4. Is Petitioner's direct application to this Court for Habeas Corpus relief under these circumstances proper?

Facts

Petitioner, Carmine Galante, along with twenty-eight other defendants, was charged with violation of the Federal Narcotics laws, 21 U.S.C. §§ 173, 174, in an indictment filed May 5, 1960 in the Southern District of New York. The indictment contained eight counts: the first seven charged various defendants with substantive violations; count eight charged all of the defendants with conspiracy to violate the narcotics law. Petitioner was charged only with count eight.

The first trial commenced November 21, 1960 before Judge Levet and a jury, and ended in a mistrial on May 15, 1961. Fourteen of the defendants, including petitioner, were brought to trial a second time on April 2, 1962 before Judge McMahon and a jury. On June 19, 1962 the trial court granted a motion of acquittal as to the defendant, Frank Mari. On June 25, 1962 the jury returned a verdict of guilty as to the remaining thirteen defendants on all counts in which they were named. On July 10, 1962, sentencing took place. Petitioner received a 20-year sentence and a $20,000 fine, the maximum penalty for the conspiracy offense.

For the second trial, petitioner consulted with various lawyers and finally decided on Miss Frances Kahn. He consulted with Messrs. Williams and Wadden on four or five occasions. He consulted with Mr. Jacob Sheintag on three or four occasions. After further deliberation he settled on Miss Kahn.

Mr. Nicholas Ianuzzi was petitioner's friend of 35 years, but not his lawyer. Mr. Ianuzzi served temporarily as a stand-in for petitioner's counsel between the first and second trials, but he did not have petitioner's confidence.

About three weeks before the second trial opened on April 2, 1962, petitioner hired Miss Kahn and gave her the

record of the first trial. Mr. Ianuzzi had allowed his name to appear as petitioner's counsel of record up to April 2, 1962, the opening day of the trial. On that day he informed the court that he was ill, that he knew nothing of the facts of the case, and that petitioner had retained Miss Frances Kahn to represent him. Mr. Ianuzzi told the court that he had made a previous application to another judge to be relieved; that judge had ruled that he could be relieved, but only after other counsel was ready to proceed without any adjournment. Mr. Ianuzzi stated that petitioner had procured other counsel ready to take over, and to proceed immediately and inquired whether Miss Frances Kahn could be substituted for him. The court took this request under consideration.

Later, Mr. Ianuzzi presented a stipulation of substitution, pursuant to which Miss Kahn was to be substituted as petitioner's counsel. At this point the prosecutor stated that he had no objection to the substitution, but suggested to the court that Mr. Ianuzzi not be relieved. The court accepted the suggestion of the prosecutor and permitted Miss Kahn merely to join with Mr. Ianuzzi as co-counsel. The court based this ruling on the ground that Miss Kahn had informed the court of the proposed substitution only that morning, while she had been retained three weeks before. Miss Kahn stated that she had no earlier opportunity to advise the court of the substitution because she had not been sure that she could be ready in time. Later the same day, the court signed the stipulation of substitution.

Thereafter, the court treated Miss Kahn as petitioner's sole counsel. An instance of this occurred on May 16th. Miss Kahn was half-an-hour late at the opening of court. She excused her tardiness on the ground that she had been ill. The judge called petitioner into the robing room and suggested that he must get either associate counsel of his own choosing, or he must provide now for coverage by one of the other lawyers in the case.

Petitioner did not act on the court's suggestion to procure stand-by counsel, in part because Miss Kahn explained that it would be impossible to prepare other counsel at this stage (the trial had been in progress for a month-and-a-half; there had been a long prior trial which ended in a mistrial, which had a transcript of over 14,000 pages), and in part because of the financial burden which stand-by counsel would entail.

On June 12th, Miss Kahn did not appear in court because she had met with an accident the preceding night and had been hospitalized. Evidently, the trial judge's law clerk was notified, for he called it to the attention of the Assistant U.S. Attorney in charge of the case. The latter conducted an informal investigation and reported to the court that he had spoken to physicians who had examined Miss Kahn and had learned that there was a severe contusion. Without having seen any X-rays, one of the physicians stated that there was probably a hairline fracture. The court directed the prosecutor to prepare an order appointing a physician to examine Miss Kahn.

Without even awaiting the results of the examination, the judge immediately had petitioner brought before him in the robing room. The court inquired of petitioner whether he had other counsel, to which petitioner replied that he had not. Thereupon the court recessed the trial and allowed petitioner one day to obtain new counsel. Later that day, the court purported to discover that Mr. Ianuzzi was counsel on record in some manner, and sent him a letter commanding him to be present on the next day.

The next morning, June 13th, petitioner informed the court in detail about the efforts he had made to secure new counsel, that he had been unsuccessful so far, and that there was some hope that he could soon arrange for new counsel to appear. Miss Kahn had not yet been examined

by any court-appointed physician. At that point, the court appointed Mr. Ianuzzi to represent petitioner. Mr. Ianuzzi had not participated in the case since the opening day of the trial, April 2nd, when the court approved the substitution of Miss Kahn for himself. Both Mr. Ianuzzi and petitioner objected strenuously to the appointment. Mr. Ianuzzi informed the court that he was physically incapable of undertaking such a task and had been warned by his physician that to do so might be dangerous. In addition, Mr. Ianuzzi told the court that he had been discharged by petitioner and said, "I know nothing about the facts, I know nothing about this man's defense, and there are thousands of pages of testimony taken that have to be reviewed." (Tr. 7441). The objections of Mr. Ianuzzi and petitioner did not persuade the court. The trial was resumed that morning, immediately after the appointment of Mr. Ianuzzi.

At the time Mr. Ianuzzi was appointed, the trial had been in progress for over two months. The trial record consisted of 7,436 pages. Over 100 witnesses had been heard, and over 250 exhibits had been received. Only part of petitioner's defense had been presented.

The court ordered Mr. Ianuzzi to remain in the courtroom under penalty of contempt of court, and do his level best to represent petitioner. Mr. Ianuzzi announced that he would remain in the courtroom but would refuse to participate. Although Mr. Ianuzzi was present in court for the next three days of the trial, the record shows no further participation by him in the trial.

Mr. Ianuzzi entered a hospital on the morning of Monday, June 18th. The court gave petitioner until 1:00 P.M. that day to procure new counsel. In the meantime, the court ordered the appointment of doctors to examine Miss Kahn and Mr. Ianuzzi and ordered the preparation of body attachments for them in case they were found able

to be present at the trial by 1:00 P.M. The doctors were unable to find objective symptoms of the pains in Mr. Ianuzzi's chest or the injuries suffered by Miss Kahn, although Miss Kahn claimed that her right leg was paralyzed. However, the body attachments remained unexecuted.*

At 1:15 the same day (June 18th), the court appointed Mr. Kenneth O'Connor to represent petitioner. The court directed Mr. O'Connor to be ready to represent petitioner when the trial resumed the next morning. Mr. O'Connor had been acting as the representative of Mr. Burton Turkus, who had been considering coming into the case to represent the petitioner. During the previous week, Mr. O'Connor on behalf of Mr. Turkus had attempted to obtain an adjournment of the trial in order to allow sufficient time to prepare petitioner's defense. These requests were denied by the court.

Petitioner objected to the assignment on the ground that Mr. O'Connor was merely a representative sent to speak with him on behalf of Mr. Turkus. Mr. O'Connor objected to the assignment on the ground that he was totally unfamiliar with the case and totally unprepared to proceed and that the time available to him for preparation (until 10:00 A.M. the next morning) would be wholly inadequate. He said "I still feel that I could not adequately represent the defendant and from my point of view afford the defendant a fair and constitutional trial." (Tr. 8087). Mr. O'Connor's motion for a continuance was denied. The court alleged to compensate for the shortness of time for preparation by directing the prosecutor to assist Mr. O'Connor in familiarizing himself with the case.

At the time Mr. O'Connor was appointed the trial had been in progress over two months. The trial record

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* Based on these factors, the District Court found manipulation.

consisted of over 8,000 pages. Over 120 witnesses had been heard and over 275 exhibits had been received in evidence. There had been a prior trial of petitioner and the other defendants which had ended in a mistrial, which had a trial record of over 14,000 pages.

The trial resumed the next morning, with Mr. O'Connor attempting to represent petitioner. Mr. O'Connor delivered his summation to the jury three days after his assignment to the case.

To compound Mr. O'Connor's problems, petitioner's witnesses were no longer available, since the court had released them two days before Mr. O'Connor was appointed. An analysis of the circumstances surrounding this action by the court provides a further insight to the burdens under which the attorneys who were appointed to represent petitioner were forced to labor.

At the first trial, several witnesses testified that they observed petitioner in Florida at the same time that the government's chief witness testified that he saw petitioner in New York City taking part in the alleged conspiracy. These witnesses were: Angelo Presenzano, Gloria Presenzano, Antoinette Acquavella, and Peter Salanardi, who all testified that they lived with petitioner at two motels in Florida during the time in question; Clark Geartner, a lifeguard at one of the motels; Bernard Shaffer, the manager of one of the motels; Joey Posnick, a 15-year-old boy who went fishing with the petitioner; Joseph D. Hanny, a waiter at one of the motels; Larry Cotzin, a detective Sargent with the Miami Police Department. Unfortunately for petitioner, the jury at the first trial was never allowed to pass judgment on the testimony of these witnesses, since a mistrial was declared.

At the second trial, petitioner's attorney, Frances Kahn, called Angelo Presenzano, Gloria Presenzano and

Peter Salanardi as her first witnesses concerning petitioner's presence in Florida during the period in question. These witnesses were petitioner's companions at the Florida motels. After the third of these witnesses, Peter Salanardi, had completed his testimony, the court informed Miss Kahn that she would be allowed to present only one more witness concerning petitioner's presence in Florida on the ground that further testimony would be merely cumulative. After Miss Kahn argued strenuously that she desired to put several independent witnesses as to the Florida situation on the stand, the judge relented and modified his ruling to allow two independent witnesses.

Before Miss Kahn had a chance to put any more witnesses on the stand she suffered a fall and was hospitalized. On June 15th, while Miss Kahn was in the hospital and while petitioner was without the assistance of other counsel of his own choosing (Mr. Ianuzzi had been appointed to represent petitioner over the objection of petitioner and himself; he was totally unprepared to defend petitioner), the court asked petitioner himself whether or not he wanted his other Florida witnesses to stay in New York and be put on the stand. Petitioner replied that he did not want to make that decision on his own, but he felt that he should be able to be advised by counsel at this point. Since petitioner would not indicate whether or not he wanted the witnesses to stay to testify, the court released them from their obligation to remain under penalty of contempt. The witnesses so released were Joey Posnick, Larry Cotzin, Joseph Hanny, and a Mrs. Myrtle. All of these witnesses, with the exception of Joseph Hanny, returned to Florida immediately.

Subsequently, Mr. Kenneth O'Connor was appointed to represent petitioner. At Mr. O'Connor's insistence, the court decided to allow the use of all of petitioner's Florida testimony. This turned out to be a hollow concession, however, since all of the witnesses except Hanny had

returned to Florida. Even Mr. Hanny failed to show up to testify. The court did allow Mr. O'Connor to read to the jury the testimony at the first trial of the witnesses who had returned to Florida, explaining to the jury that the witnesses were "unavailable."

POINT I

The Court of Appeals, as to Our First Issue, Committed Error and Improperly Held the District Court's Finding Correct, Based upon Assumption That Manipulation Was "Afoot" and Not So Devoid of Basis as to Require Reversal, Depriving Galante to Effective Assistance of Counsel

In view of Judge Moore's expositions of the principles of law applicable to the issue of manipulation and possible waiver, we shall attempt to treat the facts leading up to those issues which he treats and expound on them. Suffice it to state the court of appeals on that point is incorrect. There are numerous decisions of other courts of appeals in the various circuits and the Second Circuit's decisions conflict with the decisions of the Third Circuit in relation to manipulation.

Judge Moore, in writing for affirmance on our first issue, considered that Judge McMahon's assumption "Manipulation" was a valid cogent reason to reject Galante's claim of being denied the right to effective assistance of counsel. The Court of Appeals adopted the reasoning of the District Court's conclusion to hold manipulation. The trial judge pointed out the following factors in discussing the above holding. The informal discussion and reports of two appointed physicians by the court who examined both attorneys *infra*, that stated to the trial judge "they were unable to find 'objective' symptoms of the pains." From the above quoted facts, one has to wonder in "awe" how on earth a doctor could possibly find "objective" symptoms of pain?

First in analyzing these factors, pain is not "objective," but a "Subjective" symptom as a warning that something is wrong within the body, pain derives through the autonomic or peripheral or central nervous system, pain cannot be seen under X-ray or any other methods, nor can it be found. Pain can only be expressed to a physician. The statements of the two doctors are not in accord with medical evidence and are absolutely contrary to science and are totally without merit. It is precisely, and only these erroneous factors, the trial judge took into consideration, aside from some other minute unfounded statements to decide in his mind manipulation. The court of appeals adopted this reasoning to affirm on that issues.

As mentioned above, the Second Circuit justified any violations of petitioner's right to counsel on the ground that he had "manipulated" that right. Although it is difficult to find any facts which would support such a loaded accusation, the facts indicate why the Second Circuit chose this standard rather than the strict standards of waiver.

The Second Circuit bases its conclusion that the right to counsel was being manipulated on the following facts: Petitioner's counsel, Frances Kahn, was hospitalized; petitioner's appointed counsel, Nicholas Ianuzzi, was hospitalized; doctors appointed by the court found no objective symptoms of pain or illness when they examined Miss Kahn and Mr. Ianuzzi; petitioner objected to the appointment of Mr. Ianuzzi and Mr. O'Connor and failed to retain other counsel. 319 F.2d at 937.

When these factors are analyzed closely, it is extremely difficult to find anything that might be called manipulation. It is impossible to conclude that the facts amounted to a waiver of the right to counsel under the law.

One factor relied on by the court is that the doctors appointed to examine Miss Kahn and Mr. Ianuzzi in the hospital were unable to find any objective symptoms of injury or illness. It is difficult to believe that members of the bar would intentionally feign illness requiring hospitalization in order to avoid their obligations to represent a client. It strains credulity to infer that Frances Kahn, who had represented petitioner vigorously until the time of her accident, and who was in the middle of presenting petitioner's defense, would suddenly decide to leave her client without the benefit of counsel at a crucial point in the trial.

Mr. Ianuzzi, a former Assistant U.S. Attorney, had been ordered to remain in the court to represent petitioner under the threat of contempt. It is incredible to conclude that he would intentionally risk being subject to such a penalty by feigning illness. In fact, the record shows quite clearly that Mr. Ianuzzi was suffering extreme pain both at the time the trial started and when he was appointed to represent petitioner.

Curiously, the Second Circuit fails to mention in its opinion that at the time of appointment of Mr. Ianuzzi, the information which was available to the court as to Miss Kahn's injury consisted of the following: that Miss Kahn had tripped and fallen and injured her hip, that there was severe contusion, and that there was probably a hairline fracture. It was not until June 18th, a week after Miss Kahn had suffered her fall, that the doctors appointed by the court conducted their examination. From these facts, it would seem impossible for the trial court to have concluded on June 13th, when Mr. Ianuzzi was appointed, that the right to counsel was being "manipulated."

It is equally difficult to find any "manipulation" in petitioner's objections to the appointment of two unprepared attorneys, who were not of his choosing.

In point to the District Court's finding, it was error to assume the doctors' statements. Since there were facts to be resolved on the basis of their incorrect medical findings to hold manipulation, an evidentiary hearing should have been held by law, as there is a dispute to the factual findings, said statements may be evidentiary but not conclusory. See, *United States v. McCarthy,* 443 F.2d 591 (1970).

In *United States v. Bergamo,* 154 F.2d 31 (3rd Cir. 1946), on the first day of the trial the District Court refused to allow out-of-state counsel, who had been retained as chief counsel, to represent the defendants at trial. The District Court denied a motion for continuance by local counsel to allow him time to familiarize himself with the case. A jury was drawn that day and the trial commenced the next morning. As mentioned above in the *Bergamo* case, appointed counsel refused to put forward any defense because the defendants felt he was unprepared to defend them. Although appointed counsel expressly stated that the defendants "waived" their right to put forward a defense, the court found that under the circumstances of that case the rights of the defendants had not been waived. Rather, counsel was merely informing the court that he could not proceed in view of his unfamiliarity with the case.

In this case, as in the *Bergamo* case, the defendant (petitioner) objected to being represented by unprepared counsel not of his choosing. Also, here both appointed attorneys objected to the refusal of the court to allow sufficient time for preparation. Here, as in *Bergamo*, unprepared appointed counsel (Mr. Ianuzzi) refused to participate in his client's defense because he was unprepared to adequately represent him. Yet, here, the Second Circuit finds that there was manipulation which justified any deprivation of petitioner's rights, while in *Bergamo*, the Third Circuit concluded that essentially

similar facts did not establish that defendants had waived their rights.

The Court of Appeals reversed the conviction on the ground that defendants had been denied the assistance of counsel. The conclusion that assistance of counsel had been denied was based on two grounds: (1) defendants had been denied counsel of their own choosing; and (2) representation by counsel had not been effective. In explanation of the second ground, the court stated: "Assistance is not effective when counsel has insufficient time to prepare his defense." 154 F.2d at 34.

As to Ianuzzi's representation, it is obvious that he was not allowed sufficient time to prepare. Although there is some question as to whether Ianuzzi technically was petitioner's counsel at the time he was directed to represent petitioner, there is no question about the fact that he was totally unprepared to represent petitioner at that time. Under these circumstances the immediate resumption of the trial was a violation of petitioner's right to effective assistance of counsel. All the cases cited stand for the proposition that the right to counsel is abridged if the trial is commenced immediately after appointment of counsel. The same reasoning applies to an immediate resumption of trial after counsel is appointed.

The facts of this case are very close to those in the *Bergamo* case *supra*. There, even though local counsel had been counsel of record for three weeks prior to trial, when defendants' counsel-in-chief was disqualified the court erred in refusing to allow local counsel time to prepare the defense. In fact, this case presents an even greater violation of the right to effective assistance of counsel. Here the trial had already been in progress for two months and the record exceeded 7,000 pages.

Under the reasoning of the above cases, it is irrelevant whether or not the representation appears to have been ef-

fective if in fact counsel was not allowed sufficient time to prepare the defense.

The failure of Ianuzzi to formally request a continuance should not nullify the violation of petitioner's rights, especially when both petitioner and Ianuzzi objected so strenuously to the appointment.

As to Mr. O'Connor, the facts are even more compelling. Before he was appointed, Mr. O'Connor had had no connection with the case. He was given less than 18 hours to familiarize himself with the case, not allowing time off for sleep. "Whether time allowed counsel for a defendant for preparation for trial is sufficient depends upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and pertinent facts, and the availability of material witnesses", the time allowed for Mr. O'Connor to prepare was certainly not sufficient. In the *Bergamo* case, the actual trial did not commence until the day after the appointment of counsel; yet the time for preparation was held insufficient. Here a conspiracy trial involving 14 defendants had been in progress for over two months when the appointment was made. Surely, *Bergamo* alone would compel reversal of petitioner's conviction.

In *Palumbo v. State of New Jersey,* 334 F.2d 524 (3rd Cir. 1964), the Third Circuit reiterated its careful approach to the issue of waiver of counsel. After an exhaustive examination of the facts surrounding the waiver issue, the court concluded that defendant had not waived his right to counsel. In reaching its conclusion, the court stated,

> Whether there has been an effective waiver of the right to counsel must depend on the facts and circumstances of a particular case, including the background, experience and conduct of the accused. 334 F.2d at 532.

The court repeated the rule that the "courts indulge every reasonable presumption against waiver (of the right to counsel)" *Id.* Finally, the court quoted the language of *Carnley v. Cochran,* 369 U.S. 506, 516 (1962):

> Presuming waiver from a silent record is impermissible. The record must show or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. 334 F.2d at 533.

In order to determine whether the law of the Third Circuit on assistance of counsel is contrary to the law in the Second Circuit it is necessary to look not only to the rule announced by the Second Circuit in affirming petitioner's conviction, but to how the rule was applied to the facts of that case. Such an inquiry will not only show the conflict in rules of law between the circuits, but will also show in petitioner's case that the trial court even considered the question of waiver; it obviously did not inquire into all the circumstances to see whether a waiver had occurred.

The court failed to hold a live (evidentiary hearing) to resolve the issues of fact, which is mandatory to reach that question and answer. *Townsend v. Sain,* 372 U.S. 293, *Smith v. Yeager,* 393 U.S. 122 (1968).

In conclusion, it has been shown that there is a clear conflict between the rules of law in the Second and Third Circuits on the subject of the right to assistance of counsel, and that under the Third Circuit rule, petitioner's conviction is void since he did not waive that right. This petition for a writ of habeas corpus is the only effective means to challenge the legality of petitioner's detention. The petition should be granted.

POINT II

Petitioner Galante Was Deprived of His Sixth Amendment Right to Have Counsel of His Own Choice

During the petitioner's trial and throughout all proceedings it is clearly set forth that Galante demanded and requested counsel of his own choosing which he had at the inception of his trial and during his trial for months, until a serious mishap placed his attorney in the hospital. The Court, upon his erroneous belief - see Part I *supra* - appointed two unprepared attorneys to defend petitioner who were not of petitioner's own choosing and petitioner objected vigorously for a week's time to have a new attorney of his own choice to represent him. It is clear that contact was made with the new attorney and progress was made with the fact that within a short time, he would be there to represent Galante, see Facts *supra*. The Court disregarded petitioner's request and had the trial continue with a Mr. Ianuzzi first to represent petitioner (He will be discussed in depth in Point III *infra*). Ianuzzi was forced upon petitioner against his wishes and objections, as was Mr. O'Connor.

The trial judge's appointments of two unprepared attorneys violated petitioner's Sixth Amendment right to counsel of his own choosing, without a need of actual prejudice being shown. In *Long v. State,* 166 S.ED. 365 (1969), a defendant's attorney was absent from court because he was at the hospital with his sick wife. The trial court directed the defendant to employ his attorney's associate to represent him because there would be a delay before return of his own counsel. The court held:

> "Each person has the right to counsel of one's own choice xx, the court abused its discretion by denying the defendant the right of counsel of his own choosing."

The likelihood of prejudice, not its actuality, is inherent where desired counsel of one's own choosing is lacking at any critical stage of a proceeding, our advanced propositions of Law are upheld on firm ground. See, *Faretta v. California,* 95 S.Ct. 2525 (1975). The Supreme Court in this landmark law decision cleared cloudy waters in an unbroken series of counsel cases extending over a long period of time and stretch of the Supreme Court's History that in criminal cases the accused is entitled to the full protection of the spirits of the Sixth Amendment.

The Court, speaking, held: For a defendant to be forced or accept against his will an appointed lawyer by the court is unconstitutional.

A close perusal of *Faretta,* speaks of the assistance of counsel. The spirit of the Sixth Amendment contemplates that counsel, like other defense tools guaranteed by the Amendment, shall be willing aid to a willing defendant not an organ of the state interposed between an unwilling defendant and his constitutional rights. To thrust counsel upon an accused, against his considered wish thus violates the spirit of the Sixth Amendment and the logic of the First Amendment. In such a case, counsel is not an assistant but a master. We state the principles of *Faretta* are directly in point to petitioner's Sixth Amendment issue where both lawyers were forced upon him while at trial, depriving him of counsel of his own choice and rises to a constitutional violation per se. In order to place the magnitude of this failure in petitioner's case in proper perspective, it is imperative that the historic function of counsel and client be reviewed against judicial tyrants and against improper Courtroom procedure which we will deal with in our Point III *infra.* Petitioner was deprived of his Constitutional Rights via the Sixth Amendment to have counsel of his own choice.

POINT III

Petitioner Galante Was Violated of His Rights Where the Trial Court Forced Unwilling Counsel upon Him, Where Counsel Refused to Participate During Three Days of Trial, Which in Effect Deprived Petitioner of Counsel, and Forced Petitioner to Sit in Court Pro Se

A number of Constitutional issues loom large in the wake of the above violations which need ventilation. To leave these critical legal questions unattended would be outrageous. We have here the seeds of a major constitutional controversy.

Judge McMahon's lip service during the trial in point to Galante's counsel problem, we feel it fair to say, is a hodgepodge of misconstruction of the true facts and reasons, incongruously arrayed in a plethora of inopposite implications further adorned with erroneous argument under the guise of fairness on the part of the trial judge, that he (the court) was the upright fair judicial officer attempting his best to protect the rights of petitioner whom he inferred was using obstructionist tactics to hamper his conspiracy trial for which he was convicted.

The judicial artfulness by Judge McMahon was clever indeed very clever, but as one proceeds further into the murky waters of this well-hatched plot, the water begins to clear and the reflections appear that Judge McMahon was committing a conspiracy with the government by using every devious and deceptive method to prevent Galante to have and receive proper counsel to protect his rights, thus placing a noose around his neck.

Mr. Ianuzzi was appointed by the court; both he and petitioner objected. Mr. Ianuzzi told the court he knew nothing about the case, testimony or facts. The court ordered Mr. Ianuzzi to remain in the courtroom under

penalty of contempt and do his level best to represent petitioner. At the time Mr. Ianuzzi was appointed, the trial had been in progress for over two months, the record consisted of 7,436 pages and over 100 witnesses had been heard, "nothing of what Mr. Ianuzzi knew or heard about."

Mr. Ianuzzi announced he would remain in the courtroom but he would refuse to participate. For the next three days of trial before a jury, Mr. Ianuzzi was present, but did not participate in any manner.

The above classically exemplifies our contentions. It is more than crystal clear that the trial judge, under prepense each aiding and abetting the other, the prosecutor, with the expressed intent of conspiring to injure the federally-protected rights of petitioner by depriving him of counsel of his own choosing cannot be disputed. Their arbitrary and tortuous conduct borders on the diabolical. Deceit is their "forte", indeed, they are, "Masters of Deceit", but now they are past masters. See, Point II *supra.*

How fair and just can this be termed, we must go further. Petitioner Galante sat at the defense table with attorney Ianuzzi, who did not speak or confer with him, nor participate in the trial at all. Without being sarcastic Galante's position was analogous as if he had no attorney at all. *Gideon v. Wainwright,* 372 U.S. 335 Sl. Ed. 2d 799, 83 S.Ct. 792, 93 ALR 2d 733, cases cited therein.

Recently the United States Supreme Court, in *Geders v. United States,* Slip Opinion No. 74-5968, decided March 30, 1976, held, that an order preventing petitioner from consulting his counsel "about anything" during a 17-hour overnight recess impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment. While the facts may differ in *Geders,* we

believe the well-established principles which flow from those structures constitute grave violations in substance to petitioner's case.

In petitioner's case, Ianuzzi did not consult, speak or participate in the trial for three days, during a critical stage of the proceedings "before a jury." Thus the noose was firmly tightened.

The decision of *Faretta* has many holdings, and the decision is retroactive, and applies to and controls petitioner's case on all fores. One of the main holdings is in point where the court cannot force an attorney upon a defendant who wants to act pro se and defend himself. This is what occurred in *Faretta* and the Supreme Court reversed at 45 L.ED. 2d 582. The point is in direct line in point to petitioner, the court forced an attorney upon him. We have another crucial issue upon a close analysis. By Ianuzzi's conduct, petitioner was pitted against defending himself having no knowledge of law; therefore, the court forced him into a pro se position. Just as a court can't force an attorney upon a defendant, a court can't force a defendant to act or be placed in a position to proceed in a pro se manner.

The facts may differ, but the legalistic principles are paralleled and directly apply on solid ground. Either way, petitioner Galante was violated under *Faretta.*

The argument we will now develop for this court is Novel and Unique but possessing the stern qualities of the meat and substance of our issues.

In our description *supra* of the restrictive holds placed upon petitioner, there appears to resemble a "Hobsons Choice"; a person confronted by no choice, or an alternative; but impaled as a Violator *upon either* when chosen. The analysis of the *Hobsons Choice* was revealed

in the 17th Century, when Thomas Hobson let horses, but required customers to take the one *nearest the door,* i.e., "No Choice." The concept of Hobsons Choice was also applicable in judicially-created rules, and in 1968, *Justice Harlan* referred to a prior dilemma confronting defendants in prosecutions for possessary crimes: "We eliminate that Hobsons Choice." See: Cf. *Simmons v. United States,* 390 U.S. 377, 391, 394, 88 S.Ct. 967, 19 L.ED. 2d 1247 (1968).* While the facts may differ *supra,* the legalistic principles under substantive Due Process fit and uphold our propositions.

Thus in effect, Petitioner was controlled under the theory of a Hobsons Choice, i.e., No Choice.

It is noteworthy, there is another series of incidents where petitioner was forced to act Pro Se, without counsel present at all. The trial judge called petitioner and said, "...whether he himself wanted to have defense witnesses stay in New York, and if they should be put on the witness stand to testify." p. 9, Facts *supra.* In words to this effect the Court said [he] would question the witnesses. Petitioner, without any counsel present, told the Court that he would consider this, if the Court would protect his rights and make sure no waivers would occur. The Court said "No." Petitioner then said he would need counsel to advise him at that point.

The Court, based upon petitioner's answer above, released all the witnesses and prevented them from testifying.

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* To illustrate: Congress enacted a wagering tax in 1951 e.q., compelling a bookmaker to register and pay a $50 tax; in effect, therefore, he was compelled to admit his illegal activities and become subject to State Penal Law; he could refuse and thereby violate the tax law. The Court at first upheld the law, but 15 years later upheld the individual in his refusal to register. See. *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 679.

In summary, it is clear, the Court again forced petitioner to defend himself Pro Se, another consequence inflicted upon him without any counsel present. Since no counsel was present, "there is no manipulation" nor can it be assumed, unless the Court manipulated this? Further argument will be developed in our reply brief on these points; there is clear deprivations beyond any doubt under *Faretta* principles.

POINT IV

Direct Application to This Court for Habeas Corpus Is Proper

The Federal Statute which provides a remedy to vacate, set aside, or correct sentence (28 U.S.C. § 2255) states that,

> an application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief *unless* it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (Emphasis added).

Petitioner contends that his petition for a writ of habeas corpus should be entertained bt this Court because the remedy by motion under 28 U.S.C. § 2255 to the sentencing court is ineffective to test the legality of his detention. This contention is based on the reasons set forth in the following three cases:

In *Muqavero v. Swane,* 86. F. Supp. 45 (N.D. Cal. 1949), *rev'd. on other grounds,* 188 F.2d 601 (9th Cir.

1951), the District Court refused to dismiss a habeas corpus petition where petitioner's co-defendant had previously made an unsuccessful 2255 motion to the sentencing court, and the denial of that motion was affirmed on appeal. The court pointed out that the affirmance of the denial of the § 2255 motion by the Second Circuit was grounded on a rule of law that was contrary to the rule of law on that issue in the Ninth Circuit. Due to this circumstance the court held that a § 2255 motion by the petitioner to the sentencing court in the Second Circuit would be ineffective and therefore the habeas corpus petition could be entertained.

In *Wells v. Swope*, 121 F. Supp. 718 (N.D. Cal. 1954), *rev'd. sub. nom. Madigan v. Wells,* 224 F.2d 577 (9th Cir. 1955), the District Court granted the habeas corpus petition where petitioner had previously filed a § 2255 motion in the sentencing court in Texas and the Fifth Circuit had affirmed the denial of that motion on the basis of a rule of law contrary to a rule of law on that point in the Ninth Circuit. The court concluded that habeas corpus was available under these circumstances. In reversing the decision of the District Court, the Ninth Circuit woodenly applied the words to the statute (§ 2255) and held that since the statute stated that an application for a writ of habeas corpus shall not be entertained if the applicant has been denied relief on a § 2255 motion, the District Court was without jurisdiction to issue the writ. The Court of Appeals did not meet the issue posed by the District Court's implicit holding that a § 2255 motion was ineffective to test the legality of petitioner's detention.

In *Rawls v. United States,* 236 F. Supp. 821 (W.D. Mo. 1964), the court granted a petition for a writ of habeas corpus where the petitioner had previously made an unsuccessful § 2255 motion to the sentencing court, which was affirmed on appeal by the Fifth Circuit. The

court pointed out that each judge of this District Court (W.D. Mo.) who had had occasion to pass on the legal question at issue had rejected the Fifth Circuit rule and had adopted the contrary Ninth Circuit rule. Because of this fact, the court held that another § 2255 motion to the sentencing court in the Fifth Circuit would be ineffective and therefore the habeas corpus petition would be entertained.

Based on the reasoning of the above three cases, petitioner contends that a § 2255 motion to the sentencing court in the Second Circuit would be ineffective to test the legality of his detention and therefore this petition for a writ of habeas corpus should be entertained by this court. This contention is based on the fact that under the law in the Third Circuit on the Sixth Amendment right to the assistance of counsel, petitioner's conviction would be void, while one of the grounds of the Second Circuit's affirmance of petitioner's conviction was a rule of law on assistance of counsel directly contrary to the rule in the Third Circuit.

In holding that the petitioner was not denied his right to assistance of counsel, the United States Court of Appeals for the Second Circuit stated that "an accused's" right to select his own counsel, however, cannot be insisted upon or manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. *United States v. Bentvena,* 319 F.2d 916, 936, 937 (2nd Cir. 1963). In so stating its decision, the Second Circuit reaffirmed the rule laid down in *United States v. Terranova,* 309 F.2d 365 (2nd Cir. 1962). In that case, after the defendant's motion for a reduction in bail was denied, the defendant instructed his counsel to remain mute and offer no defense. On appeal from his conviction, the defendant contended that he was denied his right to effective assistance of counsel. Without considering the question of whether the defendant had

waived his right to counsel, the Court stated, "The choice of counsel and the decision as to the extent of participation of counsel in trial proceedings is for the defendant to make. He cannot manipulate that right so as to interfere with the fair administration of justice." 309 F.2d at 366. Thus, it is settled doctrine in the Second Circuit that a criminal defendant may be deprived of his right to the assistance of counsel where the court concludes that the defendant has "manipulated" that right. Since the Second Circuit has upheld the so-called "manipulation" doctrine in the last two cases in which it has considered that issue, it would be futile for petitioner to raise that issue in a motion under 28 U.S.C. § 2255, for the petitioner has no reason to believe that the Court of Appeals would reject its own established doctrine on an appeal from a denial of a § 2255 motion.

The violations which have occurred and developed for this court are in and on the face of the record in part. While it has been held that once issues are litigated through the appellate process, they cannot be re-litigated or decided again on a collateral attack, e.g., *res judicata* or issue preclusion. See, *Lauchli v. United States,* 405 U.S. 965 (1972).

In the present case, we are not faced with the obstacle of *res judicata.* The issues we raise are in conflict with other circuits and there is an intervening landmark decision from this court which presents a fundamental defect in relator's case which inherently results in a complete miscarriage of justice.

This court has held that where an issue has already been decided on direct appeal and where there is an intervening change in the law of a circuit, a defendant is entitled to raise the issue anew in a proceeding under Section 2255. This court further held that not every asserted error of law could be raised under Section 2255.

We agree, since the law of this circuit is different than the law of the Third Circuit, and the law of the Third Circuit backs our position relative to one of our points. It is our position, that because of this conflict, and because of this Court's decision in *Faretta v. California,* 95 S.Ct. 2525 (1975), which opinion directly controls the situation in relator's case and is retroactive, there are exceptional circumstances where the need for the remedy afforded by the writ of Habeas Corpus is apparent. See, *Davis v. United States,* 94 S.Ct. 2298 (1974).

This proceeding does comply with the requirements and standards set forth in 28 U.S.C. § 2242, for this court to grant issuance of an original writ of Habeas Corpus directly before this court under its jurisdiction to issue extraordinary writs pursuant to rules of the Supreme Court (Part VII) Rule 30, 31 (5).

Conclusion

The violations that occurred upon petitioner in this instant case were grave errors of law, and they rise to constitutional infirmities within the strictures of the Fifth and Sixth Amendments. This case is a proper vehicle, we submit, for announcement by this court of a rule of constitutional fairness and decency which would put the courts on notice that such official misconduct that was present in this instant case will not be countenanced in the preparation of cases. The acts and conduct committed by the Government and the Court are incompatible with a civilized system of criminal justice.

It is clear that petitioner did not receive a fair trial and that his rights were sacrificed by the Government and the Court. This case presents a classic opportunity for a reaffirmation of that standard "equal application of the law" and one standard for justice for all..

WHEREFORE, it is prayed that this Court exercise its power of judicial supremacy and sustain the writ, reverse the judgment of conviction and order petitioner released from custody.

DATED: New York, New York
February , 1978

Respectfully submitted,

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